UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, et al., Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, et al., Defendants. This Document Relates To: Lou-Martinez v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-8272; Almiron v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-6186; and Carrillo v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-6187.	Master File No. 09-CV-118 (VM) (THK)

MEMORANDUM OF LAW OF STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LTD., STANDARD CHARTERED PLC AND STANCHART SECURITIES INTERNATIONAL, INC. IN SUPPORT OF THEIR UNIFIED MOTION TO DISMISS PLAINTIFFS' COMPLAINTS

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March 21, 2011

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Standard Chartered Bank International (Americas) Ltd. ("SCBI"), Standard Chartered PLC ("SC PLC") and StanChart Securities International, Inc. ("StanChart") (collectively, "Standard Chartered"), respectfully submit this memorandum of law in support of their unified motion to dismiss plaintiffs' complaints in (1) Almiron v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-6186 ("Almiron"); (2) Carrillo v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-6187 ("Carrillo"); and (3) Lou-Martinez v. Standard Chartered Bank International (Americas) Ltd., et al., No. 10-CV-8272 ("*Lou*-Martinez"). This motion is filed in accordance with the Second Amended Scheduling Order Regarding Standard Chartered Cases, entered on February 4, 2011 (ECF No. 602).

PRELIMINARY STATEMENT

Plaintiffs in Almiron, Carrillo and Lou-Martinez were all private banking clients of SCBI, formerly American Express Bank International (Americas) Ltd. ("AEBI"), who invested in Fairfield Sentry Ltd. ("Sentry"), a hedge fund that placed nearly all of its assets with Bernard Madoff's brokerage firm, Bernard L. Madoff Investment Securities LLC ("BLMIS"). Each plaintiff seeks to recover losses resulting from Madoff's fraud.

As part of these consolidated proceedings, this Court currently is presiding over twenty-one other cases against SCBI or its affiliates arising from investments in Sentry by SCBI's clients (the "Standard Chartered Cases"). None of these cases allege that Standard Chartered or any of its affiliates was aware of or participated in any way in Madoff's Ponzi scheme. Instead, plaintiffs generally contend that Standard Chartered should be liable for their losses because Standard Chartered did not do enough due diligence to discover Madoff's fraud and did not adequately disclose Sentry's risks. Standard Chartered filed a unified motion to dismiss four representative actions on March 10, 2010, which this Court granted in part and

denied in part. See Anwar v. Fairfield Greenwich Ltd., --- F. Supp. 2d ----, 2010 WL 4183645 (S.D.N.Y. Oct. 4, 2010) ("Anwar-SCBI"). In the instant motion, Standard Chartered does not reargue any legal issues or arguments that were rejected by this Court in Anwar-SCBI, but preserves them for appeal.[1]

Pursuant to this Court's Scheduling Order of February 4, 2011, the Almiron, Carrillo and Lou-Martinez complaints are ripe for consideration. The Almiron and Carrillo complaints are essentially identical. Almiron and Carrillo each assert claims for violation of the Florida Securities and Investor Protection Act ("FSIPA") Section 517.301, breach of fiduciary duty, negligence, negligent misrepresentation, and unjust enrichment and constructive trust, based principally on allegations that (1) Standard Chartered recommended they invest in Sentry without having conducted any due diligence and misrepresenting the safety and returns of fund, and (2) after Almiron and Carrillo invested in Sentry, Standard Chartered failed to monitor their accounts sufficiently to protect them from Madoff's fraud. Almiron and Carrillo further contend that SCBI's alleged actions were part of a "scheme" by Standard Chartered to defraud them into investing in Sentry, and that even Standard Chartered's alleged failure to conduct due diligence was part of the fraudulent scheme.

All of Almiron's and Carrillo's claims are based on, or sound in, fraud, but they fail to plead a strong inference of scienter as required for such claims under Rule 9(b) of the Federal Rules of Civil Procedure. In Anwar-SCBI, this Court, applying Rule 9(b), dismissed plaintiff Ricardo Lopez's claims for fraud and negligent misrepresentation where he failed to

[1] Under the Second Amended Scheduling Order Regarding Standard Chartered Cases, Standard Chartered is not permitted to raise arguments that this Court considered and rejected in Anwar-SCBI. (ECF No. 602.) For purposes of preserving the issues for appeal, however, Standard Chartered hereby incorporates all such arguments into its motion and this accompanying memorandum.

plead a strong inference of scienter by alleging that SCBI recommended Sentry as an investment without conducting due diligence on the fund. The Almiron and Carrillo complaints rely on the same allegations to plead scienter, and all of their claims should be dismissed under the standard set in Anwar-SCBI. See Anwar-SCBI, 2010 WL 4183645, at *7-9.

The claims advanced by Almiron and Carrillo fail for several additional reasons. To begin, their claims for negligent misrepresentation and violation of Section 517.301 of Florida's Blue Sky law fail because neither plaintiff has alleged particularized facts concerning the alleged misrepresentations, such as when or where the alleged misrepresentations were made. Almiron and Carrillo also fail to allege that the challenged statements were false when made, or that they relied on any alleged misrepresentation. Nor do they allege that SCBI was the agent of the issuer of the securities at issue, Sentry—a necessary element for a claim under Section 517.301.

Moreover, Almiron and Carrillo's claims for negligence and breach of fiduciary duty rest on two distinct theories: (i) that Standard Chartered failed to conduct any due diligence prior to recommending Sentry and (ii) that Standard Chartered failed to monitor their Sentry investments. The negligence claims fail under either theory because such claims are barred by Florida's economic loss rule. Further, nondiscretionary brokers such as SCBI do not ordinarily owe ongoing duties to monitor their clients' accounts. Both Almiron and Carrillo had nondiscretionary investment accounts, and Almiron and Carrillo each expressly allege that their relationships with SCBI were limited and did not involve any substantial advisory functions. SCBI owed no duty to monitor the accounts of Almiron or Carrillo; thus it could not breach any such duty.

The Lou-Martinez complaint is premised on a wholly different theory of liability than those considered by the Court in Anwar-SCBI. Moises Lou-Martinez and his wife, Wong Yuk Hing De Lou (collectively, the "Lou-Martinezes"), assert claims for conversion and breach of fiduciary duty based on allegations that AEBI misappropriated $500,000 from their investment account in September 2005—invested it in Sentry—and did not reveal that it had made the investment until January 2009, when AEBI informed them that the money was lost in Madoff's Ponzi scheme. These allegations, however, are contradicted by the Lou-Martinezes' account statements, which, beginning in October 2005, reflected the September 2005 investment in Sentry each and every month. These allegations are also contradicted by allegations made by Mr. Lou-Martinez in the anchor case in this MDL proceeding, Anwar v. Fairfield Greenwich Ltd. ("Anwar"), where he acts as a named plaintiff. In the Anwar Second Consolidated Amended Complaint ("SCAC"), Lou-Martinez alleges that the Fairfield defendants misled him into choosing to invest in Sentry. (SCAC ¶¶ 181, 355-58) Because the essential allegations in support of the Lou-Martinezes' conversion and breach of fiduciary duty claims are contradicted by their account statements and allegations in Anwar, those claims should be dismissed. Matusovsky v. Merrill Lynch, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (Marrero, J.) (allegations that are contradicted by other materials cannot survive a motion to dismiss).

The Lou-Martinezes also assert claims for breach of duty of care, fraud, gross negligence and unjust enrichment based on the same theories set forth by Almiron and Carrillo. None of these claims can be maintained, however, because they are incompatible with the Lou-Martinezes' allegation that they did not learn until January 2009 that Standard Chartered had improperly and without authorization purchased Sentry on their behalf in September 2005. For example, the Lou-Martinezes allege Standard Chartered breached its duty of care and committed

gross negligence by failing to conduct due diligence on Sentry before recommending it to clients. Yet they do not allege that SCBI ever recommended Sentry to them. To the contrary, they allege that SCBI never told them anything about Sentry until January 2009, when Madoff's fraud was revealed. Standard Chartered cannot have breached a duty to conduct due diligence before recommending Sentry if it never recommended Sentry.

To the extent the Lou-Martinezes' allegations are not entirely self-defeating, their claims fail for largely the same reasons as Almiron's and Carrillo's: (1) all of their claims are based on, or sound in, fraud, yet they fail to meet the scienter and particularity requirements of Rule 9(b); (2) their failure-to-monitor claims fail because Standard Chartered did not owe a duty to monitor the Lou-Martinezes' account; (3) their fraudulent omission claim does not challenge an omission that was material to or relied on by the Lou-Martinezes; and (4) their claim for gross negligence is barred by Florida's economic loss rule.

BACKGROUND AND ALLEGATIONS OF THE COMPLAINTS

A. The Almiron and Carrillo Actions

On June 27, 2006, Ricardo Almiron ("Almiron") opened a nondiscretionary investment account at AEBI. On November 28, 2006, Carlos Carrillo ("Carrillo") also opened a nondiscretionary investment account at AEBI. Almiron and Carrillo each executed an Account Application and Agreement for Individuals ("Account Agreement") and agreed to be bound by the Rules and Regulations Governing Accounts as amended from time to time. (Declaration of Patrick B. Berarducci ("Berarducci Decl.") Ex. A (Almiron Account Agreement) §§ 5, 14); & Ex. B (Carrillo Account Agreement) §§ 5, 14.) Almiron and Carrillo each executed a Nondiscretionary Investment Services Agreement (the "NISA"), which sets forth additional terms and conditions to their accounts. (Berarducci Decl. Ex. C (Almiron NISA); & Ex. D

(Carrillo NISA); see also Almiron Compl. ¶ 18; Carrillo Compl. ¶ 18 (acknowledging accounts governed by "[v]arious agreements").)

When opening their accounts, Almiron and Carrillo agreed that Standard Chartered was "not acting as a fiduciary to customer in connection with any transaction, the investment account, any holdings and/or the agreement" and was exculpated from liability arising from their accounts absent "gross negligence, willful misconduct, or bad faith." (Berarducci Decl. Ex. C (Almiron NISA) ¶¶ 5(d), 11(b) (emphasis in original removed); & Ex. D (Carrillo NISA) ¶¶ 5(d), 11(b) (emphasis in original removed).) Almiron and Carrillo also represented that in making investment decisions for their accounts, they "w[ould] not rely on any statement, representation, warranty, information, recommendation, suggestion, opinion, or action, or the absence thereof, by AEBI or its representatives." (Berarducci Decl. Ex. C (Almiron NISA) ¶ 11(c) (emphasis in original removed); & Ex. D (Carrillo NISA) ¶ 11(c) (emphasis in original removed).)

Because the Almiron account and the Carrillo account were nondiscretionary, Standard Chartered needed prior authorization to make any investments in those accounts. (See Almiron Compl. ¶¶ 30, 40; Carrillo Compl. ¶¶ 32, 42.) The only transaction that either Almiron or Carrillo ever executed through Standard Chartered was an investment in Sentry. (Almiron Compl. ¶ 25; Carrillo Compl. ¶ 26.). Carrillo alleges that SCBI recommended Sentry to him in September 2008, and that he purchased $350,000 of Sentry shares that same month. (Carrillo Compl. ¶¶ 30, 33.) Almiron alleges that Sentry was first recommended to him in either "late-

November or early-December 2008" and that he made one investment of $100,000 in Sentry in December 2008.[2] (Almiron Compl. ¶¶ 29, 31.)

Almiron and Carrillo each filed a complaint against SCBI in Florida State Court on February 19, 2010. Their complaints were removed to the Southern District of Florida and subsequently transferred to this Court by order of the Judicial Panel on Multidistrict Litigation and consolidated with Anwar for pretrial purposes on September 7, 2010. The Almiron and Carrillo complaints are essentially identical to each other and advance Florida statutory and common-law claims that are similar to the claims asserted in the other Standard Chartered Cases and considered by this Court in Anwar-SCBI.

First, Almiron and Carrillo each assert claims for fraud, negligent misrepresentation, and violation of Section 517.301 of the FSIPA based on three alleged misrepresentations or omissions: (1) that SCBI misrepresented Sentry as a "safe, low-risk investment with steady returns" (Almiron Compl. ¶ 93(a); Carrillo Compl. ¶ 94(a)); (2) that SCBI failed to disclose that Sentry "was a Madoff-feeder fund that merely funneled the funds it raised to BLMIS" (Almiron Compl. ¶ 93(b); Carrillo Compl. ¶ 94(b)); and (3) "[t]hat the private placement memorandum issued by [Sentry] and distributed to the Plaintiff[s] by [SCBI] was misleading and falsely stated 'affiliated investment manager' of [Sentry] was managing [Sentry]'s assets, never disclosing the identity of BLMIS, and unknown third-party" (Almiron Compl. ¶ 93(c); Carrillo Compl. ¶ 94(c).) None of these alleged misrepresentations are accompanied by particularized factual allegations.

[2] Almiron's Statement of Account for September 2008 demonstrates that he made his $100,000 investment in Sentry in September 2008, not December 2008. (Berarducci Decl. Ex. E (Almiron Statement of Accounts of Sept. 2008).)

Second, Almiron and Carrillo each assert claims for breach of fiduciary duty and negligence based on the allegations that Standard Chartered did not conduct any due diligence on Sentry prior to recommending the fund, and failed to oversee and monitor plaintiffs' accounts on an ongoing basis after their initial investments. (Almiron Compl. ¶¶ 58, 77, 87; Carrillo Compl. ¶¶ 60, 79, 88.) Almiron and Carrillo both contend that SCBI's alleged failure to conduct due diligence "was so severely reckless as to be akin to fraud," although neither alleges that SCBI had motive or opportunity to defraud them, or engaged in deliberately illegal conduct, in recommending Sentry.

Third, Almiron and Carrillo each assert a claim for unjust enrichment and constructive trust to recover "commissions and administrative, management and other fees" paid in connection with their accounts. (Almiron Compl. ¶ 100; Carrillo Compl. ¶ 101.) Almiron and Carrillo acknowledge, however, that their relationship with SCBI was governed by contractual agreements (Almiron Compl. ¶ 18 and Prayer for Relief; Carrillo Compl. ¶ 18 and Prayer for Relief), and neither Almiron nor Carrillo alleges that they lack an adequate legal remedy for their alleged losses.

B. The Lou-Martinez Action

On January 27, 1998, plaintiffs Moises Lou-Martinez and Wong Yuk Hing de Lou opened a joint nondiscretionary investment account at AEBI by executing an Account Agreement. (Berarducci Decl. Ex. F (Lou-Martinez Account Agreement) § 15.) Under the terms of that relationship, AEBI required authorization from the Lou-Martinezes to execute any trades in their account. (See Lou-Martinez Compl. ¶¶ 32, 44.)

In September 2005, a $500,000 investment in Sentry shares was transacted in the Lou-Martinezes' account at AEBI. (Lou-Martinez Amended Complaint ("Am. Compl.) ¶ 2.) The investment was reflected on the Lou-Martinezes' Statement of Accounts dated October 31,

2005, and on every monthly account statement thereafter until the time Madoff's fraud was exposed in December 2008. (Berarducci Decl. Ex. G (Lou-Martinez Statement of Accounts of Oct. 2005) at 8-9; Exs. H-J (Lou-Martinez Statements of Accounts of Jan. 2006-2008) at 6; & Ex. K (Lou-Martinez Statements of Accounts of Nov. 2008) at 7.)

Mr. Lou-Martinez is a named plaintiff in the Anwar action. On September 29, 2009, plaintiffs in Anwar filed a Second Consolidated Amended Complaint ("SCAC"). In Anwar, Lou-Martinez alleges that he was misled by Fairfield Greenwich Group ("FGG") and certain entities and individuals associated with FGG (collectively, the "Fairfield defendants") into choosing to invest in Fairfield Sentry. In particular, Lou-Martinez alleges that he invested in Fairfield Sentry in approximately September 2005 after receiving copies of Fairfield Sentry's offering memoranda and marketing materials. (SCAC ¶¶ 60, 181.) According to Lou-Martinez there, he invested in Fairfield Sentry in reliance on representations from the Fairfield defendants "that the[] assets were being invested using a split-strike conversion strategy, . . . that assets in the [Fairfield] Funds were earning substantial, consistent returns over time," and "[t]he Fairfield Defendants . . . and their financial services providers and auditors were conducting extensive due diligence and monitoring of Madoff's operations." (SCAC ¶¶ 60, 181-82, 358, 365, 383-84, 391-92.)

On September 27, 2010 (two days before the SCAC was filed), the Lou-Martinezes filed a complaint against SCBI, Standard Chartered PLC and StanChart Securities International, Inc., seeking to recoup the same Madoff-related losses that Mr. Lou-Martinez is seeking to recover in Anwar. The Lou-Martinezes filed an amended complaint on October 19, 2010, asserting causes of action for conversion, breach of fiduciary duty, breach of duty of care, fraud, gross negligence, and unjust enrichment. (Lou-Martinez Am. Compl. ¶¶ 36-75.)

Notwithstanding that the Lou-Martinezes' Sentry investment was reflected on thirty-eight separate monthly account statements between October 2005 and December 2008, and Lou-Martinez's allegations in the Anwar SCAC, the Lou-Martinezes allege here that they did not know they were invested in Sentry until January 2009. (Lou-Martinez Am. Compl. ¶¶ 5, 30-32.) Specifically, the Lou-Martinezes allege that AEBI misappropriated $500,000 from their account in September 2005 by either (i) purchasing Sentry on their behalf without their authorization, or (ii) withdrawing the money from their account without their authorization and putting the money to some other use that they do not identify. (See Lou-Martinez Am. Compl. ¶¶ 5, 7, 34, 35, 37, 38.) The Lou-Martinezes do not allege any specific facts in support of these claims, only that they first learned of the September 2005 Sentry investment in January 2009. (Lou-Martinez Am. Compl. ¶¶ 22-31.) In fact, they do not allege any interactions between themselves and AEBI or SCBI at all prior to January 2009.

The Lou-Martinezes also allege that Standard Chartered: (i) breached its duty of care by failing to conduct adequate due diligence into Sentry prior to recommending it to them (Lou-Martinez Am. Compl. ¶¶ 47-71); (ii) committed fraud by failing to disclose that Bernard Madoff managed Sentry's assets (Lou-Martinez Am. Compl. ¶¶ 64-65); and (iii) failed to oversee and monitor their investments in Sentry (Lou-Martinez Am. Compl. ¶¶ 43, 50-51, 69-70). The Lou-Martinezes do not attempt to reconcile these claims with their allegations that they were unaware of their Sentry investment until after Madoff's fraud was revealed.

All of plaintiffs' claims fail and the complaints should be dismissed.

ARGUMENT

For a claim to survive a motion to dismiss, "the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above

the speculative level.'" *ATSI Commc'ns, Inc.* v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (quoting Twombly, 550 U.S. at 555-56). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." Id. at 1949 (quoting Twombly, 550 U.S. at 557).

Where, as here, claims are based on, or sound in, fraud, a plaintiff must also meet the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," Fed. R. Civ. P. 9(b), and plead facts giving rise to a "strong inference of fraudulent intent," Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006) (quoting Acito v. IMCERA Grp., Inc., 47 F.3d 47, 52 (2d Cir. 1995)) (internal quotation mark omitted).

In deciding a motion to dismiss, "a court must accept the non-moving party's factual allegations as true." Matusovsky, 186 F. Supp. 2d at 400. The Court is free to consider certain materials outside the complaint, however, including documents attached to or integral to the complaint and materials "either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing the suit." Anwar-SCBI, 2010 WL 4183645, at *3 (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2001). In this case, the Court may properly consider plaintiffs' account agreements, account statements and the offering documents for the Sentry fund. Spain v. Deutsche Bank, No. 08-CV-10809, 2009 WL 3073349, at *3 n.3 (S.D.N.Y. Sept. 18, 2009) (considering Offering Materials—subscription agreement, private placement memorandum and limited partnership agreement—on motion to dismiss); Schnall v.

Marine Midland Bank, 225 F.3d 263, 266 (2d Cir. 2000) (considering Cardholder Agreement, account history, and monthly statements). If plaintiffs' "allegations are contradicted by such . . . document[s], those allegations are insufficient to defeat a motion to dismiss." Matusovsky, 186 F. Supp. 2d at 400.

Applicable federal law is governed by the law of the Second Circuit and this District. Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993). The substance of plaintiffs' common-law claims is governed by Florida law. See Anwar-SCBI, 2010 WL 4183645, at *6 (applying Florida law to plaintiffs' common law claims).

I. ALL PLAINTIFFS FAIL TO PLEAD A STRONG INFERENCE OF SCIENTER AS REQUIRED UNDER RULE 9(B).

A claim sounds in fraud, and thus is subject to the requirements of Rule 9(b), when the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim. Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004) (applying Rule 9(b) to claims under Section 11 and Section 12(a)(2) of the Securities Act of 1933); see also Spira v. Curtin, No. 97-CV-2637, 2001 WL 611386, at *3 (S.D.N.Y. June 5, 2001) (applying Rule 9(b) to breach of fiduciary duty and conversion claims). "In applying this pragmatic standard to reject plaintiffs' efforts to 'characterize claims by the label used in the[ir] pleading,' courts in the Second Circuit have applied Rule 9(b) to any cause of action that bears a close legal relationship to fraud or mistake, as well as to individual claims that, as pleaded, are predicated on allegations of fraud." Matsumura v. *Benihana Nat'l Corp.*, 542 F. Supp. 2d 245, 251 (S.D.N.Y. 2008) (quoting Rombach, 355 F.3d at 172) (alteration in original) (citations omitted).

Here, Rule 9(b) applies to all of the claims advanced by Almiron, Carrillo and the Lou-Martinezes because each claim is "integrally interconnected" with allegations of fraud. See In re Alstom SA Sec. Litig., 406 F. Supp. 2d 402, 411 (S.D.N.Y. 2005) (Marrero, J.). Almiron

and Carrillo allege that SCBI "engaged in a common plan, scheme, and unlawful course of conduct" to defraud them into investing in Sentry (Almiron Compl. ¶¶ 63-69; Carrillo Compl. ¶¶ 65-71), and advance different causes of action related to the various parts of the alleged scheme (e.g., Almiron Compl. ¶¶ 70-80 (alleging SCBI failed to discover Madoff's fraud through conduct that was "akin to fraud"); Carrillo Compl. ¶¶ 72-81(same)). The entire premise of the Lou-Martinez action is that Standard Chartered engaged in a scheme to misappropriate their money "for personal and/or commercial gain" by concealing and subsequently lying about unlawfully withdrawing money from plaintiffs' account.[3] (Lou-Martinez Am. Compl. ¶ 39.) Even the Lou-Martinezes' due diligence claims allege that Standard Chartered's failure to detect Madoff's scheme "was so severely reckless as to be akin to fraud." (Lou-Martinez Am. Compl. ¶ 61.)

This requirement under Rule 9(b) that plaintiffs plead a strong inference of scienter applies even to those claims based on negligence that would not normally require such a showing, including claims for negligent misrepresentation. In re Parmalat Sec. Litig., 479 F. Supp. 2d 332, 339 & n.30 (S.D.N.Y. 2007) (requiring strong inference of scienter for negligent misrepresentation claim that sounded in fraud); see also Rombach, 355 F.3d at 171 (applying scienter requirements of Rule 9(b) to claims under Section 11 and Section 12(a)(2) of the Securities Act even though such claims generally do not require scienter, because the claims sounded in fraud). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b)

[3] See Rombach, 355 F.3d at 172 (claims sounded in fraud where "the wording and imputations of the complaint," which referred to false representations, were "classically associated with fraud"); see also Matsumura, 542 F. Supp. 2d at 252 (applying Rule 9(b) where allegations of false representations and omissions with scienter were "a quintessential averment of fraud").

by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Lerner, 459 F.3d at 290-91 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)) None of the plaintiffs here make this required showing.

A. Plaintiffs Do Not Allege Facts Sufficient To Establish a Motive To Commit Fraud.

Plaintiffs fail to plead that Standard Chartered had a motive to commit fraud. At best, plaintiffs suggest that Standard Chartered was "motivated" by "personal and/or commercial gain" (Lou-Martinez Am. Compl. ¶¶ 39, 59), such as by the receipt of "commissions and administrative, management and other fees" (Almiron Compl. ¶¶ 34, 100; Carrillo Compl. ¶¶ 36, 101). These allegations are not sufficient to establish a motive under Rule 9(b). It is well established in this Circuit that "generalized motives," such as the increased service fees suggested by plaintiffs here, "which could be imputed to any bank, are not sufficiently concrete for purposes of inferring fraudulent intent." Schmidt v. Fleet Bank, Nos. 96-CV-5030, 96-CV-7836, 96-CV-9705, 96-CV-9706, 1998 WL 47827, at *4, 6 (S.D.N.Y. Feb. 4, 1998) (allegation that defendants became involved in a Ponzi scheme to preserve fees was insufficient to establish a strong inference of fraudulent intent).[4]

In MLSMK Invs. Co. v. JP Morgan Chase & Co., 737 F. Supp. 2d 137, (S.D.N.Y. 2010), the court rejected precisely the same theory raised by plaintiffs here. In that case, plaintiffs alleged that defendants JP Morgan Chase & Co and JP Morgan Chase Bank ("JP Morgan") were motivated to participate in Madoff's fraud because JP Morgan earned substantial

[4] See also In re Fannie Mae 2008 Sec. Litig., Nos. 08-CV-7831, 09-MD-2013, 2010 WL 3825713, at *6 (S.D.N.Y. Sept. 30, 2010) (defendant's general desire to earn management fees insufficient to satisfy Rule 9(b)); OSRecovery, Inc. v. *One Groupe Int'l, Inc.*, 229 F.R.D. 456, 459 (S.D.N.Y. 2005) (where plaintiffs alleged Ponzi scheme involving fraudulent debit cards, fees from sale of debit cards and ATM fees do not constitute adequate motive); Clark v. Nevis Capital Mgmt., LLC, No. 04-CV-2702, 2005 WL 488641, at *17 (S.D.N.Y. Mar. 2, 2005) ("An allegation that the Defendants 'had a motive to commit the fraud because the better the funds' performance, the higher their fees' . . . is insufficient to provide the requisite motive.").

fees by providing banking services to BLMIS. As the court noted, this was not enough: "the Second Circuit has repeatedly found that routine benefits derived in the ordinary course of business do not constitute the type of 'concrete benefit' necessary to allege fraudulent intent under Rule 9(b)." 737 F. Supp. 2d at 143 (citing Chill, 101 F.3d at 268).

B. Plaintiffs Do Not Allege Facts That Constitute Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness.

The Almiron, Carrillo and Lou-Martinez complaints also fail to satisfy the scienter requirement of Rule 9(b) because each makes only conclusory allegations that Standard Chartered acted with conscious misbehavior or recklessness. (E.g., Lou-Martinez Am. Compl. ¶¶ 61, 65; Almiron Compl. ¶¶ 63, 65, 77; Carrillo Compl. ¶¶ 65, 67, 79.) Two sets of factual allegations advanced by the plaintiffs pertain to the issue: (1) that AEBI allegedly invested the Lou-Martinezes' assets in Sentry without their authorization (Lou-Martinez Am. Compl. ¶¶ 5, 30, 32); and (2) that AEBI/SCBI recommended and/or invested in Sentry without having conducted any due diligence on the fund despite the existence of red flags that should have alerted them to Madoff's fraud (see, e.g., Almiron Compl. ¶¶ 36, 54, 58; Carrillo Compl. ¶¶ 38, 56, 60; Lou-Martinez Am. Compl. ¶ 61). Neither set of allegations approaches the level of "knowledgeable participation in the fraud or . . . deliberate and conscious disregard of facts" that is required to satisfy Rule 9(b). In re Bayou Hedge Fund Litig., 534 F. Supp. 2d 405, 415 (S.D.N.Y. 2007) (citation and internal quotation marks omitted).

The Lou-Martinezes are unable to allege strong circumstantial evidence that AEBI intentionally invested their money without authorization. When assessing allegations of intent, the Court should "assume that the defendant is acting in his or her informed economic self-interest." Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994) (citing Atl. Gypsum Co. v. *Lloyds Int'l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990)). It would have been

illogical for AEBI intentionally to invest the Lou-Martinezes' money without their authorization in return for relatively small fees because such a course of action would have subjected AEBI to substantial civil liability and reputational harm. See Schmidt, 1998 WL 47827, at *6, 10 (no motive to defraud because "logic defeat[ed] the inference that [defendant bank] would expose itself to substantial financial liability and reputational harm by [defrauding clients] . . . simply for the short-term benefit of having access to additional deposits"). It would have been doubly illogical for AEBI to make the unauthorized investment and then mail monthly account statements to the Lou-Martinezes reflecting the investment for years thereafter.

Allegations that Standard Chartered recommended Sentry without having conducted any due diligence on the fund are likewise insufficient to support the necessary strong inference of scienter. As this Court noted in Anwar-SCBI, it is not enough to allege that "Standard Chartered recommended Fairfield Sentry without conducting any diligence and that, if it had, [Madoff's] fraud would have been revealed." 2010 WL 4183645, at *8. Indeed, Second Circuit precedent "makes clear[] that allegations that an advisor failed to investigate an investment are not sufficient to make out scienter on a § 10(b) claim." Id. (citing South Cherry St., LLC v. Hennessee Grp. LLC, 573 F.3d 98 (2d Cir. 2009)); see also MLSMK Invs. Co., 737 F. Supp. 2d at 143-44 (JP Morgan's continued trading with and provision of banking services to Madoff despite red flags, combined with liquidation of JP Morgan's position in Madoff's fund, did not constitute strong circumstantial evidence of conscious misbehavior or recklessness); Anwar-SCBI, 2010 WL 4183645, at *9 (recognizing that the scienter requirement for Florida common-law fraud is more stringent than federal securities fraud and dismissing Florida common-law fraud and negligent misrepresentation claims based on alleged failure to conduct due diligence).

The Almiron, Carrillo and Lou-Martinez complaints are plainly deficient. Each relies on the kinds of allegations already rejected by this Court and many others—that Standard Chartered recommended Sentry without conducting any "of its own due diligence or investigations" and that "[r]easonable due diligence, including typical quantitative analysis, would have revealed that Fairfield Sentry Ltd., Madoff and BLMIS were involved in a fraudulent scheme." (Almiron Compl. ¶¶ 36, 54, 58; Carrillo Compl. ¶¶ 38, 56, 60; see also Lou-Martinez Am. Compl. ¶ 61 ("Defendants' conduct was so severely reckless as to be akin to fraud, in that they never performed any due diligence, and, even if they did perform some due diligence, their effort was grossly inadequate.").) This is not sufficient under Rule 9(b). All of plaintiffs' claims, which all sound in fraud, should be dismissed for failure to allege a strong inference of scienter.

II. THE LOU-MARTINEZES' CLAIMS FOR CONVERSION AND BREACH OF FIDUCIARY DUTY FOR UNAUTHORIZED INVESTMENT FAIL AS A MATTER OF LAW.

The Lou-Martinezes advance claims for conversion and breach of fiduciary duty based on the allegation that AEBI misappropriated $500,000 from their investment account in September 2005 and did not inform them of the investment until January 2009, when SCBI "disclosed" that the money had been invested in Sentry but was lost in Madoff's Ponzi scheme. (Lou-Martinez Am. Compl. ¶¶ 36-46.) Both claims fail as a matter of law.

First, the claims are implausible because their factual premise is flatly contradicted by the Lou-Martinezes' monthly account statements and their own allegations in the Anwar SCAC. Second, the claims are time-barred and waived under Florida law because the Lou-Martinezes did not bring this action for more than five years after their investment in Sentry was reflected on their account statements. Third, the conversion claim fails because the Lou-

Martinezes do not allege that Standard Chartered deprived (or intended to deprive) them of their assets by purchasing shares of Sentry on their behalf.

A. Plaintiffs' Implausible Conversion-Based Claims Are Contradicted by Their Own Monthly Account Statements and Allegations in the Anwar Action. (Lou-Martinez Count I, II)

The Lou-Martinezes contend that AEBI, without their authorization, withdrew $500,000 from their account in September 2005, either purchased Sentry or put the money to some other undisclosed use and did not disclose the investment until January 2009. This allegation is flatly contradicted by their account statements, which, beginning in October 2005, plainly reflected their investment in Sentry. (Berarducci Decl. Exs. G-K.) These allegations are also contradicted by Mr. Lou-Martinez's allegations in Anwar, where he alleges that he affirmatively chose to invest in Sentry after receiving disclosures regarding the Sentry Fund. (Anwar SCAC ¶¶ 60, 181-82, 358, 365, 383-84, 391-92.)[5] Because the Lou-Martinezes' conversion and breach of fiduciary duty claims depend on allegations that are contradicted by properly admitted documents, those claims cannot survive dismissal. See Matusovsky, 186 F. Supp. 2d at 400-01 (dismissing claims that were based on allegations that were contradicted by documents outside the complaint).

[5] "[T]he Court may take judicial notice of admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings that contradict the party's factual assertions in a subsequent action." Harris v. N.Y. State Dep't of Health, 202 F. Supp. 2d 143, 173 n.13 (S.D.N.Y. 2002) (citing Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991)); accord SEC v. Czarnik, No. 10-CV-745, 2010 WL 4860678, at *3 (S.D.N.Y. Nov. 29, 2010).

B. Plaintiffs Did Not Challenge the Allegedly Unauthorized Transaction in Sentry for Almost Five Years After Being Put on Notice of the Investment. (Lou-Martinez Counts I, II)

Even if the Lou-Martinezes' claims for conversion and breach of fiduciary duty were not rendered entirely implausible by their account statements and allegations in Anwar, the claims are nevertheless defeated because they are time-barred.

Under Florida law, the statute of limitations for conversion and breach of fiduciary duty claims is four years. Fla. Stat. Ann. § 95.11.[6] The Lou-Martinezes' conversion and breach of fiduciary duty claims fall well outside this period. The claims arise from Standard Chartered's alleged conversion of $500,000 from the Lou-Martinezes' account on September 28, 2005. This action initiated on September 27, 2010, almost a full year after the four-year limitations period had expired. (Lou-Martinez Am. Compl. ¶¶ 23, 27, 29, 35; Berarducci Decl. Ex. G at 8-9.) While Florida's delayed discovery rule applies to cases like Lou-Martinez that are "founded upon fraud," the rule only tolls the beginning of the statutory period until "the time the facts giving rise to the cause of action . . . should have been discovered with the exercise of due diligence."[7] Fla. Stat. Ann. § 95.031(2)(a). Here, the Lou-Martinezes long ago could have

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[6] See also Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 869 n.3 (Fla. Dist. Ct. App. 2010) (citing Fla. Stat. Ann. § 95.11(3)(a)) (negligence); Brooks Tropicals, Inc. v. Acosta, 959 So. 2d 288, 295 (Fla. Dist. Ct. App. 2007) (citing Fla. Stat. Ann. § 95.11(3)(j)) (fraud); Berg v. Wagner, 935 So. 2d 100, 102 (Fla. Dist. Ct. App. 2006) (citing Fla. Stat. Ann. § 95.11(3)(o)) (breach of fiduciary duty); Swafford v. Schweitzer, 906 So. 2d 1194, 1195 (Fla. Dist. Ct. App. 2005) (citing Fla. Stat. Ann. § 95.11(3)(k)) (unjust enrichment); Feingold v. Am. Rack & Stack, Inc., 734 So. 2d 479, 480 (Fla. Dist. Ct. App. 1999) (citing Fla. Stat. Ann. § 95.11(3)(h)) (conversion).

[7] In Florida, the delayed discovery rule applies only when expressly provided by statute. Davis v. Monahan, 832 So. 2d 708, 708-12 (Fla. 2002). The applicable statute does not provide for tolling for claims that are not "founded upon fraud." Fla. Stat. Ann. § 95.031; see also Davis, 832 So. 2d at 708-12 (granting summary judgment for claims of breach of fiduciary duty, civil theft, conspiracy, conversion, and unjust enrichment). As a result, if this Court were to disagree that the Lou-Martinezes' claims "sound in fraud" for purposes of Rule 9(b) (see supra at 13), then the discovery rule would not apply to those non-fraud claims and they necessarily would be barred by the statute of limitations regardless of when plaintiffs learned of the investment.

discovered the investment of $500,000 in Sentry because it was reflected on every one of their account statements from October 2005 through to January 2009. (Berarducci Decl. Exs. G-K; Lou-Martinez Am. Compl. ¶ 31.) Moreover, even if not time-barred, the Lou-Martinezes' claims are barred because they acquiesced in the transactions by failing to challenge the investments for five years after the investments were repeatedly disclosed to them. See Hayden, Stone Inc. v. Brown, 218 So. 2d 230, 236 (Fla. Dist. Ct. App. 1969) (investor's acquiescence barred relief on a churning claim against his broker where the investor had received monthly account statements and confirmation slips but failed to object); see also Gordon v. duPont Glore Forgan Inc., 487 F.2d 1260-62, 1261 n.2 (5th Cir. 1973) (broker failed to inform a client that his account had become under margined, but Florida law barred recovery because client's monthly account statements put him on notice within a reasonable time yet he took no action for more than four months).

C. The Lou-Martinezes Were Not Deprived of the Possession of Their Assets. (Lou-Martinez Count I)

"Under Florida law, conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time." Small Bus. Admin. v. Echevarria, 864 F. Supp. 1254, 1262 (S.D. Fla. 1994) (citing *Nat'l Union Fire Ins. Co.* v. Carib Aviation, Inc., 759 F.2d 873 (11th Cir. 1985)). To be liable for conversion, a plaintiff must demonstrate "a present intent on the part of the wrongdoer to deprive the person entitled to possession of the property." Senfeld v. Bank of Nova Scotia Trust Co. (Cayman), 450 So. 2d 1157, 1161 (Fla. Dist. Ct. App. 1984). Absent such an intent, no conversion has occurred even if the property at issue was destroyed or disappeared due to the fault of the defendant. See Armored Car Serv., Inc. v. First *Nat'l Bank*, 114 So. 2d 431, 433-34 (Fla. Dist. Ct. App. 1959) (bank's failure to return money that disappeared without explanation did not constitute conversion); see also Sanfisket, Inc. v.

Atl. Cold Storage Corp., 347 So. 2d 647, 648-49 (Fla. Dist. Ct. App. 1977) (warehouse company's failure to return goods that disappeared without explanation did not constitute conversion). The Lou-Martinezes cannot maintain a claim for conversion against Standard Chartered because they do not allege that Standard Chartered intended to, and did, deprive them of their $500,000.

Even assuming that AEBI had invested the Lou-Martinezes' money in Sentry without their authorization, there is no claim for conversion because the investment did not deprive them of possession of their property. After the investment in Sentry, the Lou-Martinezes retained complete control over the money and the unimpaired ability to redeem the Sentry shares to obtain their cash value, as Mr. Lou-Martinez concedes. (Anwar SCAC ¶ 175 ("Plaintiffs could have redeemed their investments in the Funds and recovered their principal at any time during the many years in which redemption requests were being paid").) To the extent the Lou-Martinezes were later permanently deprived of their property, that deprivation was caused by Bernard Madoff's fraud, not by AEBI purportedly purchasing Sentry on their behalf without their authorization in September 2005.[8]

III. ALL OF THE MISREPRESENTATION CLAIMS ALSO FAIL AS A MATTER OF LAW.

All three instant complaints assert claims based on allegations that Standard Chartered made material misrepresentations and failed to disclose material information concerning Sentry. Specifically, plaintiffs advance the following misrepresentation claims:

- common-law negligent misrepresentation based on the allegation that SCBI misrepresented Sentry as a "safe, low-risk investment with steady

[8] There is no allegation that AEBI intended for Madoff to steal plaintiffs' investment at the time AEBI purchased Sentry for plaintiffs in September 2005. Again, it would defy reason to ascribe to AEBI an intent to give its customers' money to a Ponzi schemer. See Schmidt, 1998 WL 47827, at *6, 10.

returns." (Almiron Compl. ¶ 93(a); Carrillo Compl. ¶ 94(a).)

- common-law negligent misrepresentation based on the allegation that SCBI failed to disclose that Sentry "was a Madoff-feeder fund that merely funneled the funds it raised to BLMIS." (Almiron Compl. ¶ 93(b); Carrillo Compl. ¶ 94(b).)

- common-law negligent misrepresentation based on the allegation "[t]hat the private placement memorandum issued by [Sentry] and distributed to the Plaintiff[s] by [SCBI] was misleading and falsely stated 'affiliated investment manager' of [Sentry] was managing [Sentry]'s assets, never disclosing the identity of BLMIS, and unknown third-party." (Almiron Compl. ¶ 93(c); Carrillo Compl. ¶ 94(c).)

- violation of FSIPA § 517.301 based on allegations that SCBI misled plaintiffs, but without identifying any specific representations or omissions. (Almiron Compl. ¶¶ 61-69; Carrillo Compl. ¶¶ 63-71.)

- fraudulent misrepresentation based on the allegation that Standard Chartered did not disclose that Sentry "simply turn[ed] over funds to BLMIS." (Lou-Martinez Am. Compl. ¶¶ 64-65.)

These claims can be distilled down to challenges to (i) the alleged representation that Sentry was a "safe, low-risk investment with steady returns"; and (ii) the alleged failure to disclose that Bernard Madoff managed much of Sentry's assets.

To plead common-law fraud under Florida law, a plaintiff must allege with particularity: (1) a false statement of material fact, (2) made with scienter, (3) for the purpose of inducing the plaintiff to rely on it, (4) action by plaintiff in reliance thereon, and (5) resulting damages or injury. N*at'l Ventures, Inc.* v. *Water Glades 300 Condo. Ass'n*, 847 So. 2d 1070, 1074 (Fla. Dist. Ct. App. 2003). The same elements apply to claims of negligent misrepresentation and claims under FSIPA § 517.301(1)(a).[9] See Jaffee v. Bank of Am., N.A.,

[9] The only difference between the claims is the level of scienter required to prove the claims. Common-law fraud requires a showing of actual knowledge; such a showing is not necessary under FSIPA § 517.301 or for claims of negligent misrepresentation. See Jaffee v. Bank of Am., N.A., 667 F. Supp. 2d 1299, 1319 (S.D. Fla. 2009); Grippo v. Perazzo, 357 F.3d 1218, 1222 (11th Cir. 2004). As discussed supra at 12-17, none of Almiron, Carrillo and the Lou-Martinezes adequately plead the requisite strong inference of scienter.

667 F. Supp. 2d 1299, 1319 (S.D. Fla. 2009) (negligent misrepresentation); Compania de Elaborados de Café v. Cardinal Cap. Mgmt., 401 F. Supp. 2d 1270, 1280 (S.D. Fla. 2003) (FSIPA § 517.301). To survive a motion to dismiss, a claim for misrepresentation must challenge a representation that was "false when made," Rombach, 355 F.3d at 172, and must involve a "material" fact, *Atl. Nat'l Bank* v. Vest, 480 So. 2d 1328, 1332 (Fla. Dist. Ct. App. 1985).

Each misrepresentation claim fails as a matter of law. Not only do plaintiffs fail to plead any misrepresentations with sufficient particularity, but the challenged representations and omissions were neither false nor material. Further, Almiron and Carrillo fail to state a claim under FSIPA because SCBI was neither the seller nor the agent of the seller of the Sentry shares purchased by plaintiffs.

A. All of the Misrepresentation Claims Lack the Requisite Particularity. (Almiron Counts I, IV; Carrillo Counts I, IV; Lou-Martinez Count IV)

As set forth above, Rule 9(b) applies to each claim, including claims for negligent misrepresentation, fraud and violation of FSIPA § 517.301. (See supra at 12-14.) Rule 9(b) requires that the "complaint[s] (1) specify the statements that the plaintiff[s] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Rombach, 355 F.3d at 170 (citation and quotation marks omitted). For alleged omissions, "the complaint[s] must allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff[s], and (4) what defendant obtained through the fraud." Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). Plaintiffs' alleged misrepresentations are too vague to satisfy Rule 9(b).

Simply put, the Lou-Martinezes' fraud claim alleging that Standard Chartered failed to disclose Madoff's role in Sentry makes no sense. The fundamental premise of the Lou-Martinezes' complaint is that AEBI invested in Sentry without their authorization. It would thus be difficult, to say the least, to plead facts showing they were misled by SCBI's alleged failure to disclose that Sentry was a feeder fund to BLMIS. (See Lou-Martinez Am. Compl. ¶¶ 64-65.) It is thus unsurprising that the Lou-Martinezes do not identify a single employee of, or interaction with, SCBI until January 2009, thus failing to plead any "circumstances of the omission." Adler v. Berg Harmon Assocs., 816 F. Supp. 919, 924 (S.D.N.Y. 1993).

Almiron and Carrillo fare no better. Neither plaintiff adequately alleges when or where any of the supposed misrepresentations occurred. Only once do they approximate a time frame: Almiron alleges that SCBI recommended Sentry to him "[i]n approximately late-November or early-December 2008," (Almiron Compl. ¶ 29); Carrillo alleges that SCBI recommended Sentry to him "[i]n approximately September 2008," (Carrillo Compl. ¶ 30). This not enough. See Jeff Isaac Rare Coins, Inc. v. Yaffe, 792 F. Supp. 13, 15 (E.D.N.Y. 1992) (dismissing allegations that misstatements occurred "in early January of 1991" as not sufficiently particular under Rule 9(b)).

Similarly, Almiron and Carrillo fail to allege the location of any interaction with SCBI, much less the particular location or circumstances of any alleged misstatement or omission. Adler, 816 F. Supp. at 924-25. This failure is especially critical here because both plaintiffs purport to assert their misstatement and omission claims under Florida's Blue Sky law, FSIPA § 517.301, which applies to their purchases of Sentry only if the sales occurred within the State of Florida. Allen v. Oakbrook Sec. Corp., 763 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1999) (dismissing a securities fraud claim under FSIPA § 517.301 because the sale of securities at issue

occurred outside of Florida). Section 517.301 does not apply to Almiron's and Carrillo's purchases of Sentry shares if the only connection to Florida is the location of their investment accounts.[10] Yet no further connection to the State can be inferred from plaintiffs' complaints and, in fact, the opposite inference is far more plausible in light of the circumstances of the sales. Sentry was sold pursuant to SEC Regulation S. (Berarducci Decl. Ex. L (Almiron Subscription Agreement) ¶ 5; & Ex. M (Carrillo Subscription Agreement) ¶ 5.) Regulation S exempts from federal registration requirements securities offerings that are offered and sold outside of the United States. The failure of Almiron and Carrillo to allege any facts facilitating an analysis of where they purchased Sentry runs afoul of Rule 9(b)'s particularity requirements because, among other reasons, it precludes the scrutiny of a key element required under Florida law for claims under FSIPA § 517.301.

B. None of the Challenged Representations or Omissions Are False and Material. (Almiron Counts I, IV; Carrillo Counts I, IV; Lou-Martinez Count IV)

1. SCBI's Alleged Representations Regarding Sentry Were Not False When Made. (Almiron Counts I, IV; Carrillo Counts I, IV)

Almiron and Carrillo cannot maintain claims for violation of FSIPA § 517.301 or negligent misrepresentation based on their allegations that Standard Chartered represented Sentry as a low-risk investment with steady returns because they fail to identify any facts demonstrating

[10] See Novoa v. *Safra Nat'l Bank*, 313 F. Supp. 2d 1347, 1355 (S.D. Fla. 2003) (granting summary judgment on § 517.301 claim where only connection to Florida was the presence of defendant bank's branch office in Miami); Jenkins v. Last Atlantis Partners, No. 09-CV-3581, 2010 WL 3023490, at *5 (N.D. Ill. July 30, 2010) (granting motion to dismiss Florida securities law claim because, although complaint alleged plaintiff was a resident of Florida, it did not allege "any act in connection with the sale of a security that occurred in the State of Florida"). Compare Laduca v. Swirksy, No. 02-CV-8597, 2003 WL 23162437, at *5 (N.D. Ill. July 24, 2003) (interpreting Florida law) (denying motion to dismiss because plaintiff sufficiently asserted that the transaction at issue—a pledge of stock—took place in Florida by alleging that the pledge was signed and foreclosed in Florida and the underlying stock certificate was located in Florida).

that the representations were "false when made." Rombach, 355 F.3d at 172 (dismissing misrepresentation claims under Rule 9(b) where "the complaint does not 'state with particularity the specific facts in support of [plaintiffs'] belief that [defendants'] statements were false when made" (alteration in original) (emphasis added)). Before Madoff's fraud was uncovered, Fairfield Sentry was widely regarded as a low-risk investment with "stable and steady returns." See Rosenman Family LLC v. Picard, 420 B.R. 108, 110 (Bankr. S.D.N.Y. 2009) ("Prior to the revelation of the scheme, Madoff was a sought-after money manager who appeared to generate consistently large returns for his investors."). In fact, plaintiffs themselves acknowledge that "[t]he returns received by Fairfield funds, including FSL, from BLMIS were high and consistent from 1996 through 2007." (Almiron Compl. ¶ 56(a); Carrillo Compl. ¶ 58(a) (emphasis added).)

Nor can Almiron and Carrillo maintain misrepresentation claims premised on SCBI's alleged representation that Sentry "could generate steady returns" in the future. (Almiron Compl. ¶ 41; Carrillo Compl. ¶ 43.) Such a statement concerns possible future events and thus by definition cannot be "false when made" and is not actionable. See 27 Fla. Jur. 2d Fraud and Deceit § 26 ("As a general rule, a false statement of fact, to be a ground for fraud, must be of a past or existing fact and not a promise to do something in the future."); see also Kearney v. Travelers Cas. & Sur. Co. of Am., No. 09-CV-1846, 2010 WL 745619, at *3 (M.D. Fla. Feb. 26, 2010) ("Plaintiffs . . . fail to state a claim of fraudulent inducement because these misrepresentations are nothing more than promises to perform in the future and are not actionable").

2. **Alleged Omissions Concerning the Role of Madoff and BLMIS in Managing the Fairfield Sentry Fund Are Not Material. (Almiron Counts I, IV; Carrillo Counts I, IV; Lou-Martinez Count IV)**

Almiron, Carrillo and the Lou-Martinezes also complain that neither the PPM nor SCBI adequately identified Bernard Madoff and BLMIS as managers of Sentry's assets.

(Almiron Compl. ¶ 93(c); Carrillo Compl. ¶ 94(c); Lou-Martinez Am. Compl. ¶¶ 64-65.) Plaintiffs, however, do not allege that this "omission" was material to their decision to invest in Sentry. *See Atl. Nat'l Bank*, 480 So. 2d at 1331-32 (reversing jury verdict on negligent misrepresentation claim where alleged misrepresentation was not material). Rather, they say that they "would have not invested in [Sentry] had [they] known" the truth about Madoff's involvement in Sentry. (Almiron Compl. ¶ 95; Carrillo Compl. ¶ 96; see also Almiron Compl. ¶ 40; Carrillo Compl. ¶ 42.) But such bare and conclusory allegations are not sufficient. See Kalil v. Blue Heron Beach Resort Developer, LLC, 720 F. Supp. 2d 1335, 1345 (M.D. Fla. 2010) ("[Plaintiffs'] bare statements that they would not have contracted for the property 'had they known the truth' is not sufficient to render that fact material."). Neither Almiron nor Carrillo alleges any facts, such as a familiarity with Madoff or BLMIS, or a personal practice of independently investigating investment managers, to support an inference that they would have disregarded SCBI's alleged recommendation to invest in Sentry if they had known of Madoff's involvement in the fund. See *Atl. Nat'l Bank*, 480 So. 2d at 1332 (alleged misrepresentation not material where plaintiff would have completed the transaction with or without the alleged misrepresentation).

The Lou-Martinezes' materiality allegations are even more deficient. Although the Lou-Martinezes characterize Madoff's management of Sentry's assets as "material" (Lou-Martinez Am. Compl. ¶ 65), they fail to explain how Madoff's role in managing Sentry could be material to investors such as themselves, who claim they were unaware they ever invested in the fund.

C. Plaintiffs Do Not Adequately Plead Reliance on the Challenged Representations or Omissions. (Almiron Counts I, IV; Carrillo Counts I, IV; Lou-Martinez Count IV)

Under Florida law, reliance is a necessary element for all misrepresentation

claims, even those based on alleged omissions. Humana, Inc. v. Castillo, 728 So. 2d 261, 264-65 (Fla. Dist. Ct. App. 1999). To establish reliance, "a plaintiff [must] establish that, but for the alleged misrepresentation or omission, the plaintiff would not have entered into the transaction at issue." *Tambourine Comercio Int'l S.A.* v. Solowsky, No. 06-CV-20682, 2007 U.S. Dist. LEXIS 14905, at *17 (S.D. Fla. Mar. 4, 2007). Plaintiffs fail to establish reliance for the same reasons they fail to establish materiality, namely, they fail to allege any facts to suggest they would have acted differently if the so-called omitted fact—Madoff's involvement with Sentry—would have been disclosed.[11] And, of course, the Lou-Martinezes' allegations are insufficient for the additional reason that they do not allege SCBI actually made any representation or recommendation concerning Sentry on which they could have relied, detrimentally or otherwise. (Lou-Martinez Am. Compl. ¶¶ 22-25.)

Even if reliance could somehow be inferred for Almiron and Carrillo's claims, Florida law requires that the reliance be justified. Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010). Any reliance here was not. As the Supreme Court of Florida recently explained, plaintiffs are "responsible for 'investigating information that a reasonable person in the[ir] position . . . would be expected to investigate.'" Id. (citation omitted). Almiron and Carrillo agreed by signing their NISAs that they "WILL NOT RELY ON ANY STATEMENT, REPRESENTATION, WARRANTY, INFORMATION, RECOMMENDATION, SUGGESTION, OPINION, OR ACTION, OR THE ABSENCE THEREOF, BY AEBI OR ITS REPRESENTATIVES" in making their investment decisions. (Berarducci Decl. Exs. C-D ¶ 11(c).) Accordingly, Almiron and Carrillo, as a matter of law, could not have justifiably relied

[11] In fact, as the Lou-Martinezes acknowledge, Madoff's relationship with Sentry was discussed in two news articles published in 2001 and thus was public knowledge by the time they invested in September 2005. (Lou-Martinez Am. Compl. ¶ 55.)

on SCBI to inform them that Madoff managed Sentry's assets. See Garcia v. Santa Maria Resort, Inc., 528 F. Supp. 2d 1283, 1295 (S.D. Fla. 2007) (dismissing fraud and misrepresentation claims where plaintiffs signed agreements stating that they had "not relied upon any prior agreements or representations made by anyone other than [defendant], or oral statements (including oral statements of sales representatives), except as specifically stated in this Contract" and the alleged misrepresentations were made prior to execution of the contract); Weaver v. Opera Tower, LLC, No. 07-CV-23332, 2008 WL 4145520, at *3-4 (S.D. Fla. Aug. 1, 2008) (plaintiffs "disclaimed reliance" on prior representations where the contract expressly stated that "[Plaintiffs] ha[ve] not relied upon any verbal representations, advertising, portrayals or promises" (alteration in original)); Adrianne Roggenbuck Trust, AH v. Dev. Res. Grp., LLC, No 09-CV-2158, 2010 WL 3824215, at *3 (M.D. Fla. Sept. 27, 2010) (dismissing with prejudice claim for fraudulent inducement where plaintiffs sought damages—thereby affirming contract with defendants which contained a provision prohibiting reliance on oral or outside representations).

D. Almiron and Carrillo Fail To State a Claim Under FSIPA § 517.301 Because They Do Not Allege That SCBI Was an Agent of Sentry. (Almiron Count I; Carrillo Count I)

FSIPA § 517.301 creates a criminal or administrative offense for securities fraud under Florida law that is similar to the one provided under Federal law by Rule 10b-5. E.F. Hutton & Co. v. Rousseff, 537 So. 2d 978, 981 (Fla. 1989). Although there is no implied civil private right of action under Section 517.301, Section 517.301 operates in conjunction with another statutory provision, Section 517.211, which contains an express civil liability provision:

> Any person . . . selling a security in violation of § 517.301, and every . . . agent of or for the . . . seller, if the . . . agent has personally participated or aided in making the sale[,] . . . is jointly and severally liable to the person . . . purchasing the security from such person in an action for rescission, if the plaintiff still owns the

security, or for damages, if the plaintiff has sold the security.

Fla. Stat. § 517.211(2). "[F]or the remedies of Section 517.211(2) to apply to a violation of 517.301, buyer/seller privity is required." Rushing v. Wells Fargo Bank, N.A., No. 10-CV-1572, 2010 WL 4639308, at *4 (M.D. Fla. Nov. 8, 2010) (citing E.F. Hutton & Co., 537 So. 2d at 981).

A defendant is in buyer/seller privity with the plaintiff when he is the seller of the securities or the "agent of such a seller who has solicited the sale of the securities on his own behalf or on behalf of the seller." In re Sahlen & Assocs. Sec. Litig., 773 F. Supp. 342, 372 (S.D. Fla. 1991); Fla. Stat. § 517.211(2). Courts have defined the term seller to include one who "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interest or those of the securities owner." See Rushing, 2010 WL 4639308, at *4 (quoting Pinter v. Dahl, 486 U.S. 622, 647 (1988)).

Neither Almiron nor Carrillo alleges that SCBI was the seller of the securities, or that SCBI was the agent of the seller, Sentry. In fact, neither plaintiff alleges from whom they purchased the securities. See Compania de Elaborados de Café, 401 F. Supp. 2d 1270, 1280 (S.D. Fla. 2003) (granting summary judgment where plaintiffs "failed to allege . . . that they purchased securities from [the defendant]"); Robert W. Selgrad, IRA v. U.S. Lending Corp., No. 95-CV-2053, 1996 U.S. Dist. LEXIS 22927, at *49-50 (S.D. Fla. Mar. 17, 1996) (same, granting motion to dismiss).

Here, SCBI was acting at most as Almiron's and Carrillo's agent and serving as their intermediary with Sentry. (Almiron Compl. ¶¶ 24-25, 30; Carrillo Compl. ¶¶ 25-26, 32.) In this context, there is no buyer/seller privity between Almiron and Carrillo and SCBI. See Rushing, 2010 WL 4639308, at *5 (finding no privity between plaintiff and defendant where defendant contractually agreed to act as agent to purchase investments using plaintiffs' cash collateral).

IV. PLAINTIFFS CANNOT, IN ANY EVENT, MAINTAIN CAUSES OF ACTION FOR ALLEGED BREACH OF FIDUCIARY DUTY, BREACH OF DUTY OF CARE, NEGLIGENCE AND GROSS NEGLIGENCE BASED ON A PURPORTED FAILURE TO CONDUCT DUE DILIGENCE OR MONITOR PLAINTIFFS' ACCOUNTS.

In addition to the reasons set forth above, plaintiffs' due diligence and failure-to-monitor claims fail for the following three reasons: One: Standard Chartered's alleged failure to adequately monitor plaintiffs' accounts cannot support any cause of action because Standard Chartered was a nondiscretionary broker that did not owe ongoing duties to monitor the accounts of Almiron, Carrillo or the Lou-Martinezes. Two: Florida's economic loss rule bars Almiron and Carrillo's claims for negligence (Count III), and the Lou-Martinezes' claim for gross negligence (Count V). Three: Standard Chartered's alleged failure to conduct due diligence on Sentry cannot support the Lou-Martinezes' claims for breach of duty of care and gross negligence (Counts III, V) because the Lou-Martinezes do not allege that Standard Chartered ever recommended that they invest in Sentry.[12]

[12] Almiron's and Carrillo's account agreements bar liability based on conduct less culpable than gross negligence. (Berarducci Decl. Exs. C-D ¶ 5(d) (excluding liability for "any action, inaction, omission or for any matter whatsoever in connection with the Investment Account, or for any loss or depreciation in value of the Investment Account's Holdings, unless resulting from AEBI's gross negligence, willful misconduct, or bad faith").) Thus, under this Court's decision in Anwar-SCBI, Almiron's and Carrillo's breach of fiduciary duty claims based on an alleged failure to conduct adequate due diligence can survive dismissal only to the extent that the allegations rise to the level of gross negligence. See Anwar v. Fairfield Greenwich Ltd., --- F. Supp. 2d ----, 2010 WL 4911405, at *1 (S.D.N.Y. Nov. 23, 2010); Anwar-SCBI, 2010 WL 4183645, at *14; see also, e.g., Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1166-67 (11th Cir. 2009) (enforcing exculpatory providing for "'no liability whatsoever for any loss or damage directly arising from the defectiveness or deficiency of parts . . . except if resulting from intentional conduct or gross negligence'"). Of course, here, whether pleaded as negligence or gross negligence, the claims fail under the Rule 9(b) scienter standard. (Supra at 12-17.)

A. Nondiscretionary Brokers Do Not Owe an Ongoing Duty to Monitor Client Accounts. (Almiron Counts II, III; Carrillo Counts II, III; Lou-Martinez Counts III, V)

No plaintiff here can maintain a failure-to-monitor claim because Standard Chartered had no such duty to perpetually monitor plaintiffs' accounts.[13] "It is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis." de Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293, 1302 (2d Cir. 2002); see also First Union Brokerage v. Milos, 717 F. Supp. 1519, 1526 n.21 (S.D. Fla. 1989) (nondiscretionary brokers "ha[ve] no continuing management duty over the [investment] account[s]"), *aff'd*, 997 F.2d 835 (11th Cir. 1993). Rather, where the account is nondiscretionary, "each transaction is viewed singly" and "all duties to the customer cease when the transaction is closed." Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 952-53 (E.D. Mich. 1978). Ongoing duties, such as a duty to monitor accounts, may arise for a nondiscretionary broker only where the broker, "notwithstanding its limited contractual duties, undertook a substantial and comprehensive advisory role." de Kwiatkowski, 306 F.3d at 1307 (dismissing claim against broker of nondiscretionary account for failure to provide ongoing advice because plaintiff had not established that defendant undertook an advisory role).

Almiron, Carrillo and the Lou-Martinezes all maintained nondiscretionary accounts with AEBI/SCBI. (See supra at 6, 8.) By its title and terms, Almiron and Carrillo's account agreement, the Nondiscretionary Investment Services Agreement, limits Standard Chartered's duties to those of a nondiscretionary broker. And, although the Lou-Martinezes make a single allegation that Standard Chartered had "discretionary control" over their assets

[13] Because Almiron and Carrillo invested in Sentry no more than three months before Madoff's fraud was exposed, and because Almiron and Carrillo do not allege any facts about Madoff or Sentry specific to this time period that Standard Chartered should have discovered, their failure-to-monitor claims are merely a second bite at their initial due diligence claims.

(Lou-Martinez Am. Compl. ¶ 69), that allegation is contradicted by the fundamental premise of their complaint, which focuses almost exclusively on allegations that Standard Chartered committed misconduct by investing in Sentry without their prior authorization. (Lou-Martinez Am. Compl. ¶¶ 29-32.) If the Lou-Martinezes' accounts were in fact discretionary accounts, such authorization would not have been required. They cannot have it both ways. See Koulkina v. City of N.Y., No. 06-CV-11357, 2009 WL 210727, at *6 (S.D.N.Y. Jan. 29, 2009) (court "is not obliged to reconcile plaintiffs' own pleadings that are contradicted by other matter asserted . . . by a plaintiff in drafting the complaint'" (quoting Fisk v. Letterman, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005) (alteration in original))).[14]

B. Florida's Economic Loss Rule Bars Almiron and Carrillo's Negligence Claims and the Lou-Martinezes' Gross Negligence Claim. (Almiron Count III; Carrillo Count III; Lou-Martinez Count V)

As this Court recognized in Anwar-SCBI, Florida's economic loss rule bars recovery "where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract." 2010 WL 4183645 at *10. There can be no dispute that SCBI's relationship with Almiron, Carrillo and the Lou-Martinezes is governed by account agreements, or "that this dispute—involving recommendations by Standard Chartered about how to best invest funds in . . . [p]laintiffs' accounts—arises from" those account agreements. Anwar v. Fairfield Greenwich Ltd., --- F. Supp. 2d ----, 2010 WL 3910197, at *6 (S.D.N.Y. Sept. 14,

[14] See also DeBlasio v. Merrill Lynch & Co., Inc., No. 07-CV-318, 2009 WL 2242605, at *26 (S.D.N.Y. July 27, 2009) (rejecting allegation that defendants failed to disclose certain profits where the complaint also alleged partial disclosure of such profits); Colodney v. Continuum Health Partners, Inc., No. 03-CV-7276, 2004 WL 829158, at *7 (S.D.N.Y. Apr. 15, 2004) (rejecting "bald assertion" that libelous statements were false where the allegation was "contradicted by more particularized allegations in the pleading"); see also Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) ("General, conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint." (citing Jenkins v. S&A Chaissan & Sons, Inc., 449 F. Supp. 216, 227 (S.D.N.Y. 1978); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1363, at 464-65 (2d ed. 1990))).

2010). Almiron and Carrillo's negligence claims and the Lou-Martinezes' gross negligence claim therefore should be dismissed pursuant to Florida's economic loss rule. E.g., Behrman v. Allstate Life Ins. Co., 388 F. Supp. 2d 1346, 1349-50 (S.D. Fla. 2005) (dismissing negligence and fraud-based claims under economic loss doctrine); Warter v. Bos. Sec., S.A., No. 03-CV-81026, 2004 WL 691787, at *12-13 (S.D. Fla. Mar. 22, 2004) (barring negligence claims asserted against Edge Act bank and securities broker under economic loss doctrine). Although this Court previously determined that Florida's economic loss rule does not bar breach of fiduciary duty claims, see Anwar-SCBI, 2010 WL 4183645 at *10-12, that determination has no impact on the rule's effect on other claims, such as the negligence and gross negligence claims asserted here.

C. The Lou-Martinezes Do Not Plead Facts That Would Give Rise to a Duty to Conduct Due Diligence. (Lou-Martinez Counts III, V)

In their complaint, the Lou-Martinezes describe the duty underlying their due diligence claims against Standard Chartered in the following way: Standard Chartered had an "obligation to conduct a proper investigation of the proposed investment, including its nature, price and financial prognosis, so that the advisor has a proper basis to conclude that the particular investment being recommended would be suitable for the particular type of customer to whom the recommendation would be made." (Lou-Martinez Am. Compl. ¶ 49 (emphasis added).) Thus, the duty to conduct due diligence, as alleged by plaintiffs, arises from the recommendation of an investment. But the Lou-Martinezes never allege that Standard Chartered recommended Sentry to them. In fact, any such allegation would contradict the central factual allegations of their complaint—namely, that Standard Chartered surreptitiously invested the Lou-Martinezes' funds in Sentry shares without ever informing them of the investment. (See, e.g., Lou-Martinez Am. Compl. ¶¶ 22-31.) The Lou-Martinezes thus cannot maintain these claims because they fail

to allege that Standard Chartered ever recommended Sentry to them and, therefore, do not allege a basis for any duty to conduct due diligence. Koulkina, 2009 WL 210727, at *6.

V. PLAINTIFFS' UNJUST ENRICHMENT CLAIMS FAIL AS A MATTER OF LAW BECAUSE WRITTEN AGREEMENTS GOVERN PLAINTIFFS' RELATIONSHIP WITH STANDARD CHARTERED.

Almiron, Carrillo and the Lou-Martinezes all assert claims for unjust enrichment and constructive trust against Standard Chartered, premised on the same alleged wrongdoing as their other claims. (Almiron Count V; Carrillo Count V; Lou-Martinez Count VI.) As this Court recognized in Anwar-SCBI, however, "[a]n unjust enrichment claim can exist only if the subject matter of that claim is not covered by a valid and enforceable contract." 2010 WL 4183645 at *15 (quoting In re Managed Care Litig., 185 F. Supp. 2d 1310, 1337 (S.D. Fla. 2002)). This Court thus dismissed unjust enrichment claims brought by plaintiffs in Headway Investment Corp. v. American Express Bank Ltd., Lopez v. Standard Chartered Bank International (Americas) Ltd. and Valladolid v. American Express Bank Ltd., because those plaintiffs' complaints "explicitly or implicitly refer[red] to agreements between themselves and Standard Chartered." Id. (quotations and citations omitted). Likewise here, contracts governed plaintiffs' relationship with Standard Chartered.

"It is blackletter law that 'the theory of unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy.'" In re Managed Care Litig., 185 F. Supp. 2d at 1337 (S.D. Fla. 2002) (quoting Webster v. Royal Caribbean Cruises, Ltd., 124 F. Supp. 2d 1317, 1326 (S.D. Fla. 2000)). Where "[p]laintiffs have not explicitly alleged that an adequate remedy at law does not exist, . . . the failure to do so is fatal." Id. at 1337 (citing Webster, 124 F. Supp. 2d at 1326-27); see also Martinez v. Weyerhaeuser Mortg.

Co., 959 F. Supp. 1511, 1518-19 (S.D. Fla. 1996)). Plaintiffs make no such allegations here and therefore their claims must fail.

VI. THE LOU-MARTINEZES CANNOT MAINTAIN THEIR CLAIMS AGAINST STANCHART AND SC PLC BECAUSE THEY DO NOT ALLEGE ANY WRONGDOING BY EITHER.

The Lou-Martinezes name StanChart and SC PLC as defendants but do not advance any specific allegations of wrongdoing against either defendant. Instead, they simply define the "Standard Chartered Defendants" collectively to include SC PLC, StanChart and SCBI (Lou-Martinez Am. Compl. ¶ 1), and then advance allegations of misconduct without differentiating among the defendants (see, e.g., Lou-Martinez Am. Compl. ¶¶ 1-2, 5, 7, 31, 34-75). This is not sufficient. Sofi Classic S.A. de C.V. v. Hurowitz, 444 F. Supp. 2d 231, 248 (S.D.N.Y. 2006) (Marrero, J.) (where "fraud is alleged against multiple defendants, a plaintiff must plead with particularity by setting forth separately the acts complained of by each defendant") (quoting Ellison v. Am. Image Motor. Co., 36 F. Supp. 2d 628, 641-42) (S.D.N.Y. 1999)); see also Filler v. Hanvit Bank, Nos. 01-CV-9510, 02-CV-8251, 2003 WL 22110773, at *3 (S.D.N.Y. Sept. 12, 2003) (dismissing claims under Rule 9(b) because "the complaints do not make allegations with respect to each defendant, but instead refer only generally to the defendants as 'the Banks'"). Even under Rule 8(a), because the Lou-Martinezes' Sentry investment was made in their account at AEBI / SCBI and they do not allege any actions or wrongdoing by either SC PLC or StanChart, there is no plausible and non-speculative basis to infer that SC PLC or StanChart committed any wrongdoing. See Twombly, 550 U.S. at 556 n.3, 1965 (U.S. 2007) ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the

claim, but also 'grounds' on which the claim rests."). Accordingly, the Lou-Martinezes' claims against StanChart and SC PLC should be dismissed.

CONCLUSION

For all the foregoing reasons, Standard Chartered Bank International (Americas) Ltd., Standard Chartered PLC and StanChart Securities International, Inc., respectfully request the Court to dismiss the Almiron, Carrillo and Lou-Martinez complaints with prejudice.

Dated: March 21, 2011
New York, New York

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